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Supreme Court, U.S.
FILED
JAN 16 2001
CLERK

No. 00-976

In The

Supreme Court of the United States

C. SCOTT JOHNSON, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES; REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,

Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEVIN R. MCDERMOTT
**Counsel of Record*

ROGER L. SABO
ANDREW W. STARK
CATHERINE L. STRAUSS
SCHOTTENSTEIN, ZOX & DUNN
41 South High Street, Suite 2600
Columbus, Ohio 43215
(614) 462-5001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTION PRESENTED

When a party challenges a race-based preference scheme, subject to a strict scrutiny standard of review, does a prior decision upholding that scheme which employed an incorrect standard of review have any effect on the burdens of production mandated by the heightened standard of strict scrutiny?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

1. The MBEA 2

2. The District Court Proceedings 3

3. The Ohio Supreme Court Decision in *Ritchey Produce* 5

4. The State's Reliance Upon *Ritchey Produce* 6

5. The Sixth Circuit Court of Appeals Affirmance 7

REASONS FOR DENYING THE PETITION 8

1. *Stare Decisis* Is Inapplicable, And Thus The State Has Failed To Illuminate An Issue For This Court's Review 8

2. *Keip* Does Not Have Precedential Value Because It Was Decided Under A Constitutionally Infirm Standard Of Review 9

3. The MBEA Has Never Had A "Firm Basis In Evidence." 12

4. The Need For Careful Review 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ..... *passim*

Associated Gen. Contractors of Ohio, Inc. v. Drabik, 50 F.Supp.2d 741 (S.D. Ohio, 1999)..... 6, 7, 11

Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir. 2000).....7, 8, 10, 11, 13

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Fullilove v. Klutznick, 448 U.S. 448 (1980) 15

Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987).....10, 11

Miller v. Johnson, 515 U.S. 900 (1995).....7, 10

Ohio Contractors Ass'n v. Keip, No. C-2-82-446 (S.D.Oh. Dec. 15, 1982) 11

Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) ..... *passim*

Ritchey Produce, Co., Inc. v. Ohio Dep't of Admin. Serv., 707 N.E.2d 871 (Ohio 1999)..... 5, 6, 7, 8, 9

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) ..10, 14

STATUTES

Ohio Rev. Code § 123.151..... 1, 2, 3

INTRODUCTION

In the Court below, the unanimous decision of the Panel of the Sixth Circuit Court of Appeals ended almost twenty years of unjustified, unsupported, and ultimately unconstitutional enforcement of the Ohio Minority Business Enterprise Act ("MBEA"), a statutory scheme which set aside millions of state construction dollars to select minority groups. *See* Ohio Rev. Code § 123.151 (Baldwin 1998). The MBEA was enacted in the early 1980's, purportedly to remedy discrimination in state contracting. In support of the act's passage, the Ohio legislature relied upon executive and administrative agency task force considerations of complaints regarding, and statistics concerning, minority group participation in state purchasing.

In 1982, the MBEA was challenged upon equal protection grounds. The district court determined that the evidence presented, state studies from the middle and latter 1970's, was inadequate to support a conclusion of specific historical discrimination calling for remediation, which might justify a race-based set-aside program. In fact, the Court found that in all of the evidence supplied by the State of Ohio there was not one, clear, unambiguous statement of a finding of discrimination.

On appeal in 1983, the Sixth Circuit Court of Appeals overturned the district court's ruling out of deference to the legislature, giving it the benefit of the doubt that implicit fact-finding of discrimination underlay the MBEA. *See Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). In the intervening 15 years between *Keip* and the current challenge to the MBEA, this Court mandated strict scrutiny as the standard of review for race-based

set-aside programs. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Despite these unequivocal pronouncements, the Petitioners contend that principles of *stare decisis* require that the burdens of production required in strict scrutiny review be altered when a court has previously upheld a race-based statute, albeit under a now constitutionally infirm standard of review. Because Petitioners' position has no basis in law, the Petition for Certiorari should be denied and the decision of the Sixth Circuit Court of Appeals should stand.

STATEMENT OF THE CASE

1. The MBEA.

Ohio's MBEA has been in effect with only minor modifications since 1980. The statute operates at both the prime and sub-contract level. At the prime contract level the Director of the Department of Administrative Services is mandated to set aside construction contracts with an aggregate value of approximately 5% for bidding exclusively by certified Minority Business Enterprises ("MBE's"). *See* Ohio Rev. Code. § 123.151(C)(1). At the subcontract level every contractor who obtains a prime contract from the State of Ohio has a subcontracting requirement of utilizing certified MBE's for 7% of the value of subcontracts and materials. *See* Ohio Rev. Code § 123.151(C)(2)(b). Only *certified* MBE's, Blacks, American Indians, Hispanics, and Orientals, who go through the

certification process are entitled to the benefits of the MBEA. *See* Ohio Rev. Code § 123.151(B).

Becoming a certified MBE is entirely race driven. Only the four identified groups are eligible. There are no size limitations. There are no income limitations. There is not even a requirement that the applicant demonstrate it is qualified to perform the business for which it seeks certification. Additionally, there is no limit as to how long a business may stay in the program and, unlike more recent federal statutes, the MBEA has no graduation requirements. *See* Ohio Rev. Code § 123.151 *et seq.*

Since 1989 when this Court decided *Croson*, the State has done nothing to evaluate whether the MBEA continues to serve a compelling state interest and is narrowly tailored. In fact, when the proper standard of review is applied to the MBEA it is clear that the State of Ohio has *never* established a firm basis in evidence to justify the use of a race-based preference program.

2. The District Court Proceedings.

The underlying action was brought by the Associated General Contractors of Ohio, Inc. and the Associated General Contractors of Northwest Ohio, Inc. ("AGC") as a result of the State of Ohio's decision to set aside an eight million dollar ($8,000,000) contract for a new prison facility pursuant to the MBEA. The members of AGC were qualified, willing, and able to bid upon the set-aside contract but were prohibited from doing so because they did not meet the requirements associated with being a certified MBE. Consequently, AGC filed the present suit

and asserted that the set aside of the contract, as well as the underlying statute, violated the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

As conceded by the State in its Petition for Certiorari, during the district court proceedings the State presented all of the evidence that was before the Ohio General Assembly when the MBEA was enacted, as well as compliance reports prepared by State agencies since the enactment of the law. *See* Petition at 4. Moreover, the district court afforded the State the opportunity to introduce any and all evidence at its disposal which would justify the use of a race-based program.[1]

At the close of the evidence and in light of this Court's decisions in *Croson, supra,* and *Adarand, supra,* the district court properly found that the State of Ohio had no legitimate justification for the enactment and maintenance of the MBEA. The State offered no studies showing a statistical disparity between the number of minority firms awarded contracts in relation to their availability. The State did not present anecdotal evidence detailing any incidents of discrimination in state construction contracting. The only "evidence" the State offered to support the program was either unreliable, due to the fact it failed

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[1] The State argued at the trial that if afforded the opportunity of a sixth month continuance in the proceedings it could produce additional evidence justifying the MBEA. However, the testimony revealed that the State's record-keeping mechanisms tracked only certified MBE's, and not the entire universe of minority contractors, thus leaving these statistics meaningless to a strict scrutiny analysis. Accordingly, the district court denied the request for a continuance.

to track the entire universe of minority contractors, or grossly outdated. As a result of the changes in the law as determined by this Court, the district court returned to the prescient standards under which the MBEA had been previously invalidated in 1982. After a thorough review of the evidence the district court adopted the analysis of the district court's prior decision in 1982, which anticipated the requirements of *Croson* and enjoined the State from enforcing the provisions of the MBEA.

3. The Ohio Supreme Court Decision in *Ritchey Produce.*

During the pendancy of the State's appeal of the district court's decision, the Ohio Supreme Court decided *Ritchey Produce, Co., Inc. v. Ohio Dep't of Admin. Serv.*, 707 N.E.2d 871 (Ohio 1999). The Ohio Supreme Court found the MBEA, as it applied to goods and services, was constitutional under the equal protection provisions of the United States Constitution. The court purported to review the statue pursuant to strict scrutiny analysis. However, it ultimately concluded that:

> Ohio's MBE program should be upheld unless it is clearly unconstitutional beyond a reasonable doubt. While there may be some legitimate questions concerning Ohio's MBE program, and the question might even be a close one, we are not convinced beyond a reasonable doubt that Ohio's MBE program is unconstitutional. We have reviewed the program under the strict scrutiny test, and we are satisfied that it passes constitutional muster under the United States Supreme Court's guiding precedents.

Id. at 927.[2] Despite the Ohio Supreme Court's attempt to factually distinguish *Ritchey Produce* from this case, its decision directly conflicted with the district court's conclusion in that it relied upon the same evidence that was before the district court pertaining to construction contracting in upholding the goods and services portions of the MBEA.

4. The State's Reliance Upon *Ritchey Produce.*

Following the *Ritchey Produce* decision, the State moved the district court for a stay pending appeal of the underlying case. In its motion, the State contended that as a result of *Ritchey Produce*, it was likely that it would succeed on the merits of its appeal to the Sixth Circuit Court of Appeals. In considering the State's motion, the district court requested and was provided with all of the evidence before the Ohio Supreme Court in reaching its decision in *Ritchey Produce.*

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[2] In its reported decision denying the State's Motion for Stay Pending Appeal based upon the *Ritchey Produce* decision, the district court noted that: "The Ohio Supreme Court concluded in its *Ritchey Produce* opinion with the statement that 'Ohio's MBE program should be upheld unless it is clearly unconstitutional beyond a reasonable doubt.' *Ritchey Produce,* 85 Ohio St.3d at 274. The proposition that a program of race based benefits should be upheld unless it is 'clearly unconstitutional beyond a reasonable doubt' appears to be a novel one in equal protection jurisprudence. Ohio's high Court cites no precedent to support this proposition of law, and it is difficult to reconcile it with the pronouncements contained in the various opinions of the Supreme Court of the United States which have become settled law . . . " *Associated Gen. Contractors of Ohio, Inc. v. Drabik,* 50 F.Supp.2d 741, 771 (S.D. Ohio 1999).

Ultimately, the district court issued a lengthy opinion in which it found that its decision was not reconcilable with *Ritchey Produce* and that the State of Ohio had not presented evidence which would justify the use of a race-based preference program through the MBEA. *See Associated Gen. Contractors of Ohio, Inc.*, 50 F.Supp.2d at 741.

5. The Sixth Circuit Court of Appeals Affirmance.

Upon review, the Sixth Circuit Court of Appeals affirmed the district court's holding that the MBEA is unconstitutional when analyzed under the proper strict scrutiny review. In doing so, the court articulated its reasons for departing from *Keip*:

> When, in 1983, this court [decided *Keip*] we did so out of deference to the legislature, giving it the benefit of the doubt that implicit fact finding of discrimination underlay the MBEA. *See, Keip*, 713 F.2d at 170-171. But the Supreme Court has since required more. *See Miller v. Johnson*, 515 U.S. 900, 923, 132 L.Ed 2d 762, 115 S.Ct 2475 (1995) (holding legislation adopting racial distinctions to be entitled no deference); *Croson*, 488 U.S. at 499 (holding mere assertions of legislative purposes insufficient).

Associated Gen. Contractors of Ohio, Inc., 214 F.3d 730, 734 (6th Cir. 2000).

In reviewing the MBEA *de novo* under the proper legal standards as adopted by this Court, the Sixth Circuit determined that the State of Ohio had failed to show either a compelling interest or narrow tailoring which might justify the implementation of a race-based preference program. Additionally, the court concluded that its

opinion was not reconcilable with *Ritchey Produce*, notwithstanding the Ohio Supreme Court's attempt to distinguish the two cases. *See id.* at 740.

Thereafter, the State petitioned the Sixth Circuit for a rehearing *en banc*. In doing so, the State once again conceded that strict scrutiny review applied and yet continued to rely upon *Keip* and *Ritchey Produce* in claiming that the burden was on AGC to establish that a firm basis in evidence no longer existed. That request for rehearing was denied.

REASONS FOR DENYING THE PETITION

The MBEA, as enacted by the State of Ohio, fails strict scrutiny review in that it is neither narrowly tailored nor supported by a compelling government interest. The Petition should be denied because the State has failed to assert any meritorious reason for this Court to review the decision of the Sixth Circuit Court of Appeals.

1. *Stare Decisis* Is Inapplicable, And Thus The State Has Failed To Illuminate An Issue For This Court's Review.

In attempting to rely upon "the fundamentals of *stare decisis*", the State seeks to create an issue for review where clearly none exists. Despite the pronouncements of this Court in cases such as *Croson* and *Adarand*, which clearly establish the burdens of production under strict scrutiny, the State seeks to abdicate its responsibility under this heightened standard of review by contending that AGC had the burden of proving that the State no

longer had a firm basis in evidence to support a compelling governmental interest. It's sole basis for this contention is that the Sixth Circuit previously upheld the MBEA pursuant to a constitutionally infirm standard of review.

The State's argument is disingenuous at best and completely misconstrues the long standing pronouncements of this Court. Instead of challenging the well-reasoned and legally supported decisions of the lower courts and their clear conflict with the Ohio Supreme Court's *Ritchey Produce*, as it did below, the State now shifts focus and attempts to turn principles of *stare decisis* on their head and rewrite the long standing principles of strict scrutiny.

2. *Keip* Does Not Have Precedential Value Because It Was Decided Under A Constitutionally Infirm Standard of Review.

The State's reliance on the Sixth Circuit's decision in *Keip, supra*, for its precedential effect simply misses the mark. As acknowledged by the State it its Petition, *Keip* failed to apply strict scrutiny as now required by this Court, when it approved the MBEA in the early 1980's.

Subsequent to the ruling in *Keip*, this Court, in two landmark cases, clarified the legal standard for race-based classifications. *See Adarand Constructors, Inc.*, 515 U.S. at 200; *Croson*, 488 U.S. at 469. As set forth in the appellate court's well reasoned opinion, the *Keip* court upheld Ohio's MBE program based upon judicial deference, rather than the rigid mandates of strict scrutiny subsequently mandated by *Croson* and *Adarand*.

> When, in 1983, this court overturned Judge Kinneary's ruling in that case, we did so out of deference to the legislature, giving it the benefit of the doubt that implicit factfinding of discrimination underlay the MBEA. *See Keip*, 713 F.2d at 170-71. But the Supreme Court has since required more. *See Miller v. Johnson*, 515 U.S. 900, 923, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (holding legislation adopting racial distinctions to be entitled to no deference); *Croson*, 488 U.S. at 499, 109 S.Ct. 706 (holding mere assertions of legislative purposes insufficient).

Associated Gen. Contractors of Ohio, Inc., 214 F.3d at 734-735.

The *Keip* standard of "relaxed scrutiny" has not been the law of the Sixth Circuit since it was unambiguously rejected by this Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In fact, the Sixth Circuit had already taken note of the trend developing both in this Court and other circuit courts to apply the Equal Protection Clause strictly to racial discrimination in government contracting prior to the culmination of this doctrine in *Croson* and *Adarand*. *See, e.g., Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 587 (6th Cir. 1987).

It is beyond dispute that a federal court is obligated to apply the law in effect at the time it renders its decision. *See, e.g., Michigan Road Builders Ass'n, Inc.*, 834 F.2d at 589. Accordingly, in ruling on the present challenge to the MBEA, the lower court acknowledged that its application of strict scrutiny varied from *Keip's* application, owing to this Court's subsequent clarifications of the requirements for race-based preference programs.

> This court ruled in 1983 that the MBE was constitutional, *see Ohio Contractors Assn. v. Keip*, 713 F.2d 167 (6th Cir. 1983), overruling Judge Kinneary's judgment in the district court that Ohio's scheme was unconstitutional on its face, *see Ohio Contractors Ass'n v. Keip*, No. C-2-82-446 (S.D.Oh. Dec. 15, 1982). Subsequently, the Supreme Court, in two landmark decisions, explained and applied at length the criteria of strict scrutiny under which such racially preferential set-asides were to be evaluated. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This court had already, in *Michigan Road Builders Assn. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), taken note of the trend developing both in the Supreme Court and Circuit Courts (which was to culminate in *Croson* and *Adarand*) to apply the Equal Protection Clause strictly to racial discrimination in government contracting. *Michigan Road Builders* departed from the more relaxed treatment that *Keip* had accorded to equal protection challenges to state contracting disputes. *See id.* at 598 (Lively, C.J., dissenting). *Croson* also noted that same evolution in this Circuit. *See* 488 U.S. at 477, 109 S.Ct. 706, 214 F.3d at 733.

Associated Gen. Contractors of Ohio, Inc., 214 F.3d at 733-734.

Accordingly, the Sixth Circuit was bound by well established precedents to apply the unambiguous requirements of strict scrutiny, as opposed to altering the burdens of production solely because a prior case was decided under constitutionally incorrect standards.

It is also important to note that the State by its own admission concedes that prior to the present case, no court had ever ruled upon the constitutionality of the MBEA under the strict scrutiny standard mandated and clarified by this Court in *Croson* and *Adarand*. *See* Petition at 8-9. Because *Keip* was based upon an incorrect standard of review, it defies logic how the State can now contend that the principles of *stare decisis* as a result of *Keip* could ever validly impact the decisions of the lower courts in this case.

3. The MBEA has never had a "firm basis in evidence."

Despite the State's repeated assertions to the contrary, in each instance that the MBEA has been subjected to the proper strict scrutiny standard of review by a federal court it has been declared unconstitutional. Beginning with Judge Kinneary in 1982, continuing with Judge Graham in 1998, and most recently with the Sixth Circuit Court of Appeals in 2000, every federal court that has reviewed the evidence relied upon by the Ohio legislature in enacting the MBEA under the proper strict scrutiny standard has concluded that it is legally inadequate to support a conclusion of specific historical discrimination by the State of Ohio.

As clearly set forth by the unanimous Panel, the evidence before the legislature in the early 1980's failed to prove a strong basis in evidence because: (1) raw statistical date evidencing "underrepresentation" or statistical disparities is insufficient to establish historical discrimination; (2) Ohio's statistical comparisons in 1978

did not take into account how many minority-owned businesses were contractors or that they were qualified, willing and able to perform state construction contracts; and (3) that the deficiencies of the four broad categories of evidence that were before the Ohio legislature are "glaringly clear." *Associated Gen. Contractors*, 214 F.3d at 736-739. Accordingly, the State was unable to establish the required "pervasive, systematic, and obstinate discriminatory conduct" that might justify the enactment and continued maintenance of the MBEA. *Id.* at 737 (*citing Adarand*, 515 U.S. at 237).

Despite these glaring evidentiary shortcomings, the State baldly asserts that because *Keip* upheld the MBEA, albeit under the constitutionally incorrect standard of review, that a firm basis in evidence of discrimination by the State of Ohio has been previously established. Certainly, "basic principles of *stare decisis*" do not require a court to rely upon a prior determination, which utilized a constitutionally incorrect standard of review, as precedent that establishes that the statutory scheme was constitutionally sound when enacted. The trial court and appellate court were bound to follow the law as it existed in 1998 and 2000, respectively, which clearly required strict scrutiny analysis. The State's argument not only turns principles of *stare decisis* on their head, but completely defies logic.

Moreover, principles of *stare decisis* do nothing to alter the evidentiary burdens in a case subject to strict scrutiny review. When a statute is challenged on constitutional grounds, only two scenarios exist: (1) *stare decisis* does not apply because the legal framework has changed and thus a court must revisit the issue or (2) *stare decisis* is

applicable and the binding precedent is applied. However, with its Petition, the State attempts to create a third option – it concedes that the legal framework has changed since the decision in *Keip*, but at the same time attempts to alter the burden shifting requirements of that changed framework. This is clearly a misapplication of the law regarding strict scrutiny as interpreted by this Court. Not one of the State's cited cases involve burden-shifting in actions subject to strict scrutiny, let alone race-based classifications generally.

Consequently, there is no basis for the State's contention that the Sixth Circuit placed itself in conflict with other circuits through its decision in this case. *See* Petition at 12 ("the Sixth Circuit thereby placed itself in conflict with other circuit courts on the issue of the proper allocation of the burden of production when a prior decision by a court is challenged."). The allocation of burdens pursuant to strict scrutiny has been well established by this Court. The State has not cited one case where a federal court has altered the manner in which strict scrutiny allocates burdens as the result of a race-based classification. Clearly, the State's misapplication of well-settled law does not warrant review of the lower court decision by this Court.

4. The Need for Careful Review.

As noted by the State in its Petition, this Court has cautioned that "[a]ny preference based upon racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-274 (*citing*

Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.)). Clearly the present case evidences such a searching examination. AGC established, and the State conceded in its Petition, that the legal standard utilized in *Keip* is no longer viable as a result of the pronouncements of this Court. Accordingly, principles of *stare decisis*, as articulated by the State, are inapplicable to the present challenge.

CONCLUSION

Based upon the forgoing, AGC respectfully requests that the State's Petition for writ of certiorari be denied.

Respectfully submitted,

KEVIN R. MCDERMOTT
*Counsel of Record

ROGER L. SABO
ANDREW W. STARK
CATHERINE L. STRAUSS
SCHOTTENSTEIN, ZOX, & DUNN
41 South High Street, Suite 2600
Columbus, Ohio 43215
(614) 462-5001